Supreme Court of the United States

OCTOBER TERM, 1921.

No. 52

OTTO H. KAHN and HENRI P. WERTHEIM VAN HEUKELOM, as Executors of the Last Will and Testament of Abraham Wolff, Deceased,

vs.

THE UNITED STATES.

Appeal From the Court of Claims

BRIEF FOR APPELLANTS

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STATUS.

Claimants brought suit in the Court of Claims, as executors of the will of Abraham Wolff, deceased, to recover $58,885.86, exacted from them by the Collector of Internal Revenue of the United States for the Fifth District of New Jersey under color of the legacy tax provisions of the Act of Congress of June 13, 1898 (*30 Stat. 448, 464-5*). The Court of Claims dismissed the petition (*R. 52*), with an opinion (*R. 48-52*) and the case is here on claimants' appeal.

QUESTIONS AT ISSUE.

The questions presented by the Record are:—

1. Was all, or any portion of, the sum sued for collected in respect of "any contingent beneficial interest . . . not absolutely vested in possession or enjoyment prior to . . . July 1, 1902," within the meaning of the Act of Congress of June 27, 1902 (*32 Stat. 406*)?

2. Did claimants, prior to bringing this suit, "present their claims," to the Treasury Department, in compliance with the second section of the Act of Congress of July 27, 1912 (*37 Stat. 240*)?

FACTS.

The facts found by the Court of Claims (*R. 38-48*) are summarized below:—

1. Appellants are the executors of Abraham Wolff, a loyal citizen of the United States and of the State of New Jersey who died on October 1, 1900, leaving a valid last will which was admitted to probate on November 7, 1900 (*R. 38*).

2. The will (*R. 18-38*) is made part of the findings of fact (*R. 38*).

3. The Collector of Internal Revenue originally exacted \$107,398.16 (*R. 46*). Separate refunds of \$13,983.36 and \$33,703.19, a total of \$47,686.55 (*R. 46*) have been made leaving \$59,711.61 (*R. 46*) still in the possession of defendants. Claimants admit that \$825.75 was lawfully collected (*R. 48*) and this suit was brought for the balance of \$58,885.86 (*R. 17*).

4. The interest of Flora Wolff, in the estate of the decedent was assessed as having a "clear value" of \$23,393.95 (*R. 47*) and the sum sued for includes

$350.91 exacted in respect of this interest (*R. 47, 48*). This interest was provided for by the Sixth (*R. 21*), Twenty-sixth (*R. 27*) and Thirty-seventh (*R. 34*) paragraphs of the will, as follows:

> "Sixth. I give and bequeath to my trustees, their survivors and successors, Forty thousand dollars, in trust, however, to invest and keep the same invested in such securities as my trustees are by the Thirty-sixth article of this my will authorized to make investments in, and to pay the interest and income arising therefrom to my niece Flora Wolff for and during her life, and upon her death I direct that the same shall be added to and form part of my residuary estate, to be disposed of as hereinafter provided, and until my said trustees shall receive the aforesaid principal sum I do hereby direct my executors to pay out of the income of my estate to my niece Flora Wolff, the sum of One hundred and twenty dollars a month. The foregoing provision is, however, subject to the provisions contained in the Twenty-eighth article of this my will, subdivision third, and the Thirty-fifth article."

> "Twenty-sixth: If in the judgment of my executors, the survivors and survivor of them and his successors, the foregoing pecuniary legacies, trust and absolute, taken together shall exceed twenty per cent of so much of my estate as shall remain after the deduction of any and all inheritance, succession or any similar tax, and exclusive of the house and lot devised by the next article of this my will, it is my will that such pecuniary legacies shall ratably abate to such amount as will in the judgment of my executors, the survivors and survivor of them and his successors, taken together not exceed such twenty per cent."

> "Thirty-seventh: As to all the trust provisions of my will I provide that under no circum-

stances shall any beneficiary be permitted to anticipate the income coming to him or her, or to make any disposition thereof prior to its receipt."

5. The will created interests similar to the foregoing in favor of other legatees, except that the amounts of principal and of the income to be paid pending the establishment of the trusts varied and each varied independently of the other. The facts are summarized below:—

Interest of:—	Paragraphs 26 and 27 of will and paragraph:—	Principal of trust fund	Monthly income to be paid pending setting up of trust fund	Assessment: Value assigned	Assessment: "Tax" exacted
Louis S. Myer	9	$20,000.00	$65.00	$11,085.70	$166.29
Alfred E. Frank	10	20,000.00	65.00	12,595.41	188.93
Benjamin Frank	16	20,000.00	65.00	13,215.71	198.23
Flora Wolff	6	40,000.00	120.00	23,395.95	350.91
Nellie Morris	8	40,000.00	125.00	24,148.72	362.23
Nanette Jacobs	21	40,000.00	125.00	26,994.82	607.38
Lelia Loeb	22	40,000.00	125.00	27,775.49	624.94
Fanny Elson	12	50,000.00	150.00	28,237.20	635.33
Babette Myer	13	50,000.00	150.00	10,918.56	81.88
Matilda Steinam	7	50,000.00	150.00	34,079.23	766.78
Carrie Rauch	15	60,000.00	160.00	34,496.54	766.17
Tillie Lehrburger	17	60,000.00	160.00	38,746.49	871.79
Rosa Keiffer	11	60,000.00	180.00	35,090.93	789.54
Athalie Frank	14	80,000.00	250.00	26,076.42	293.36
Lottie Elson	20	100,000.00	375.00	42,679.28	480.14

—*R. 21-5, 40, 47.* (The interest of Flora Wolff, described more particularly in paragraph 4, above, is inserted in the table for comparative purposes. It is typical of the others as fully appears from the findings of fact cited.)

No part of any of the amounts stated in the last column of the above has been refunded (*R. 48*).

6. In respect of the interest of Addie W. Kahn in the estate of the decedent, the sum of $48,905.34 was exacted by the Collector (*R. 47*), of which

$915.35 (*R. 47*) and $5,794.22 (*R. 48*), making $6,-709.57 in all, have been refunded, leaving $42.195.77 in possession of the defendants and included in the amount sued for. This interest consisted of an absolute legacy of the value of $5,000.00 (*Will, second paragraph, R. 18; R. 40-1*) and of a life interest (and no more) in one half of the residuary estate which passed to trustees in accordance with the twenty-eighth paragraph (*R. 28*).

7. In respect of the interest of Clara W. Wertheim in the estate of decedent, the sum of $50,188.47 was exacted by the Collector (*R. 47*), of which $1,073.74 (*R. 47*) and $5,905.35 (*R. 48*) and $33,703.19 (*R. 45, 48*), making $40.682.28 in all, have been refunded leaving $9,506.19 in possession of the defendants and included in the amount sued for. The interests of this residuary legatee were similar to those of Addie W. Kahn and were provided for by the same paragraphs of the will (*R. 18, 28, 40-1*).

8. None of the trust funds provided for in the will was paid to the trustees, or set apart, or established, on or before July 1, 1902 (*R. 39*).

9. The legatees named in paragraphs 6 to 22, except paragraphs 18 and 19, of the will were paid the monthly sums specified in those paragraphs (*R. 21-6, 39, 40*), the total sums paid to each of them to July 1, 1902, ranging from a minimum of $825.00 to a maximum of $7,875.00 (*R. 40*).

10. Addie W. Kahn received on or before July 1, 1902, an absolute legacy valued at $5,000.00 (*R. 40-1*), $307,488.77 income from personalty and $23,274.56 income from realty (*R. 40*).

11. Clara W. Wertheim received, on or before July 1, 1902, an absolute legacy valued at $5,000.00 (*R. 40-1*), $307,488.73 income from personalty and $25,274.56 income from realty (*R. 40*).

12. The Comptroller of the State of New York claimed that the decedent was a resident of that State, and not of the State of New Jersey, and attempted to establish, in the Courts of New York, certain claims to recover taxes on behalf of that State, based upon this claim of residence. This litigation was not concluded until November, 1903 (*R. 39*).

13. The clear values of the residuary legacies to Addie W. Kahn and Clara W. Wertheim were not ascertained and could not have been ascertained before July 1, 1902 (*R. 43*).

14. On April 4, 1904, Otto H. Kahn, one of the appellants, filed with the Collector of Internal Revenue for the Fifth District of New Jersey, a claim for the refund of $26,637.59. This claim was duly transmitted to the Commissioner of Internal Revenue and was thereafter allowed in the sum of $13,983.36, which was repaid to appellants and rejected for the balance (*R. 44*). It was not specifically alleged, in this claim, that the collection was in respect of contingent beneficial interests not vested prior to July 1, 1902 (*R. 43*).

15. On May 15, 1905, Otto H. Kahn, one of appellants, and Louis A. Heinsheimer, as trustees under the will, filed with the Commissioner of Internal Revenue a claim for $37,673.13 (in addition to the $13,983.36 claimed in the earlier claim, which had not then been repaid). This claim was rejected, but $33,703.19, of said $37,673.13, was subsequently recovered by suit (*R. 44-5, 48*).

16. On June 6, 1911, Mortimer L. Schiff, for himself and Otto H. Kahn, one of appellants, as trustees, filed a claim for the refund of $44,305.72. This claim alleged that the sum named had been exacted in respect of contingent beneficial interests not

vested in possession or enjoyment prior to July 1, 1902. This claim was rejected (*R. 45-6*).

17. Appellants, by their attorney, filed a claim for $59,711.61 on November 23, 1915, alleging that this sum had been exacted in respect of contingent beneficial interests not vested in possession or enjoyment prior to July 1, 1902. This claim was rejected on August 14, 1916 (*R. 46*).

18. A Treasury Department regulation, promulgated in connection with the law under which the Collector claimed to make this exaction, in force during the period involved, and in no way revoked or modified, is as follows:

> "When the decedent died prior to July 1, 1902, and the property was left in trust by the will, but had not been turned over to the trustee before July 1, 1902, legacy tax will not accrue." *R. 48.*

SPECIFICATIONS OF ERROR.

It is respectfully submitted that the Court of Claims was in error in the following:—

1. The Court of Claims erred in deciding that the whole amount sued for, and the amount exacted and now retained in the Treasury in respect of each legacy, was not exacted in respect of contingent beneficial interests not absolutely vested in possession or enjoyment prior to July 1, 1902, within the meaning of the Act of Congress of June 27, 1902 (*32 Stat. 406*).

2. The Court of Claims erred in deciding that appellants are not entitled to recover the whole amount sued for, and the amount exacted and now retained, in respect of each legacy, under the Act of Congress of July 27, 1912 (*37 Stat. 240*).

3. The Court of Claims erred in deciding that the claim filed on April 4, 1904 (*R. 43*), May 15, 1905 (*R. 44*), June 6, 1911 (*R. 45*), and November 23, 1915 (*R. 46*), do not satisfy the requirements of the second section of the Act of Congress of July 27, 1912 (*37 Stat. 240*).

ARGUMENT.

It will be argued:—

1. That this suit is supported by the claim required by the statute, and

2. That appellants are entitled to recover on the merits.

FIRST.

This suit is supported by the claim required.

Relief is claimed under the second section of the Act of July 27, 1912 (37 Stat. 240). This section reads as follows:—

> "That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the Act aforesaid."

The foregoing may be enforced by suit and relieves any such suit from the limitations of R. S. 3226 and R. S. 3227 (*United States v. Hvoslef, 237 U. S. 1; Rand v. United States, 249 U. S. 503, 508; Sage v. United States, 250 U. S. 33, 39.* It is subject, however, to a limi-

tation, contained in the first section, that claims must be filed not later than January 1, 1914 (*Coleman v. United States, 250 U. S. 30; Sage v. United States, supra*).

The Record shows four claims (*R. 43, 44, 45, 46*), only one of them covering the entire amount sued for.

Claim for $26,637.59 was filed on April 4, 1904 (*R. 43*). On this claim $13,688.66 (*R. 44*) was refunded and at the same time there was refunded $294.70 which had not been claimed (*R. 44*), making a total refund of $13,983.36 (*R. 44*). Under *Sage v. United States, supra,* claimants are entitled to rely on this claim as sustaining suit as to the rejected portion thereof or $12,948.93, which includes $6,412.97 in respect of the interest of Addie W. Kahn and $6,535.96 in respect of the interest of Clara W. Wertheim. This claim was given new life by the refunding act of July 27, 1912.

> "The statute of course does not confine its act of justice to unrejected claims." *Sage v. United States, 250 U. S. 33, 38.*

The Court of Claims rejected this claim, as lawful basis of suit, because it concluded (*R. 52*) that it was presented upon a "different theory from that upon which the action is predicated." The learned Judge who wrote the opinion notes that this is a rule never "specifically decided," which is undoubtedly true. In the numerous cases to be found in the books it was never before considered desirable to raise any question as to the character of the claim filed, if there was actual claim within the period limited by law. It is submitted, however, that the mere form of the claim is not conclusive as to the grounds on which it was urged and that if it were, claimants ought not to be required, at their peril, to state

their claims in technical language. Statutes authorizing claims are enacted to enable prompt collection and should be construed so as to effect that purpose, not so as to drive the taxpayer to exhaust his remedies before payment. The rigorous interpretation suggested by the Court of Claims does violence to custom and to judicial interpretations long ante-dating the Act of 1912, which must have been known to Congress at the enactment of that statute. An example is found in *Wayne v. United States, 26 C. Cls. 274.* In that case it was urged, as a matter of defense, that—

> "the original allowance or award, by the Commissioner of Internal Revenue was void, because the claim was not presented to him in a formal manner on a blank prescribed by the Secretary of the Treasury, within the time limited by the Act (*R. S. 3228*)." *26 C. Cls. 274, 289.*

The facts in regard to the claim, as stated by the reporter of the Court of Claims, were as follows:

> "James M. Wayne was an associate justice of the Supreme Court of the United States from September 1, 1862, to June 30, 1867. Pursuant to the Acts of July 1, 1862, Section 86 (*12 Stat. 472*); Act of June 30, 1864, Section 123 (*13 Stat. 285*), and the amendments of July 4, 1864 (*13 Stat. 417*), and 14 Stat. 139, 480, there was deducted from the salary of said justice the sum of $1,128.97 income tax from September 1, 1862 to June 30, 1867. On the thirtieth day of April, 1872, a statement was made out in the Comptroller's office showing the amount so withheld from Mr. Justice Wayne's salary and was attached to a blank form of application for refund of taxes improperly paid. . . . It does not appear that any formal written application for refund of said tax was ever filed in the office of the Com-

missioner of Internal Revenue by Mr. Justice Wayne." *26 Ct. Cls. 274, 276.*

Concerning the validity of the claim thus described, the Court of Claims said:

> "In the opinion of the Court this was a sufficient presentation of the claim within the meaning of the statute and the regulations, accepted as it was by the Commissioner." *26 C. Cls. 274, 290.*

See, also *14 Opinions Attorney General, 615.*

Such statutes are always construed with liberality. It is especially incumbent upon all courts, tribunals, and officers administering such statutes, to apply this rule when, as in the case at bar, injustice and injury would otherwise result and it is impossible that injury or injustice should result to either party from its application.

> "Statutes which . . . give compensation to those whose property is taken compulsorily, (and) statutes which are in favor of those on whom taxes are assessed or burdens laid . . . are remedial and to be liberally construed." *Lewis' Sutherland, Statutory Construction, second edition, section 680.*

See, also, *Neurath v. District of Columbia, 17 C. Cls. 225.*

Claim for $37,673.13 (*R. 44*) was filed, in the instant case, on May 15th, 1905, and, after suit against the Collector (*R. 45, 48*) $33,703.19 was refunded on account of this claim, leaving $3,969.94 of the sum claimed still in possession of defendants. This claim, as to the rejected balance, also obtained new life from the Act of July 27, 1912. The fact that the Collector obtained judgment as to this balance does not affect the present suit.

"The former judgment is not a bar . . . if

the judgment otherwise were a bar, the bar would be removed by the subsequent enactment of the Act of July 27, 1912 . . ." *Sage v. United States, 250 U. S. 33, 36, 38.*

This claim was made by one of appellants (and another), who was and is executor, but who called himself "trustee." The Court of Claims rejected it, as basis of suit, because (1) of this misdescription and (2) on the ground rejected by this Court in *Sage v. United States, supra.* Neither objection is considered tenable. Appellant was entitled to make claim and did make claim. That he referred to himself as trustee when he might better have used the word "executor" is too highly technical an objection to stand in the way of substantial justice on the merits.

Claim for $44,305.72 was filed on June 6, 1911 (*R. 45*), and wholly rejected (*R. 46*). This claim, also, was given new life by the Act of July 27, 1912. *Sage v. United States, supra.* It was made by Mortimer L. Schiff for himself and for Otto H. Kahn, one of appellants, but designated in the claim as "trustees." Refusal of the Court of Claims to consider it is again based upon the mere fact of the misdescription or upon that fact and that the trustee who was also an executor (and one of appellants) appeared only by representation (*R. 45, 49*). The latter ground is inconsistent with the decision in *Wayne v. United States, supra.*

Claim for the whole amount still withheld by defendants was filed on November 23, 1915 (*R. 46*). To the extent of the three earlier claims this was a demand for the benefit of the Act of July 27, 1912 (*Sage v. United States, 250 U. S. 33, 39*). To the extent that the amount withheld, and covered by this claim, exceeds the amounts

covered in the earlier claims, it must be admitted that, if the decision in *Coleman v. United States, supra,* is applicable, the present suit is not supported by the claim required by the Act of July 27, 1912 (*37 Stat. 240*). This would have the effect of excluding from the present suit the sum of $2,970.23 which is still withheld by defendants in respect of the interest of Clara W. Wertheim and would reduce the amount for which judgment should be given from $58,885.86 (the amount sued for) to $55,915.63. This total of $55,915.63 is fully covered by claims filed prior to January 1, 1914, the date limited by the Act of July 27, 1912.

> "The Act of 1912 applied in terms to 'all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected' under the above-mentioned Section 29. The only condition was that it should have been presented not later than January 1, 1914. Until that time no statute of limitations could begin to run." *Sage v. United States, 250 U. S. 33, 38.*

The only applicable statute of limitations is R. S. 1069 which fixes six years as the time within which suits must be brought in the Court of Claims. Whether it began to run on January 1, 1914, or when demand was made (November 23, 1915—*R. 46*) or when payment was refused (August 14, 1916—*R. 46*) is an open question, but one that cannot be of importance in this suit. The two years' limitation of R. S. 3227 does not apply— *United States v. Hvoslef, 237 U. S. 1; Rand v. United States, 249 U. S. 503, 508; Sage v. United States, 250 U. S. 33, 39.*

APPELLANTS ARE ENTITLED TO RECOVER ON THE MERITS.

The whole sum sued for was collected in respect of life interests in trust funds (*R. 21-8, 40, 47*) and none of these trust funds, nor any part of any of them, had been paid to the trustees prior to July 1, 1902 (*R. 42-3*) when the taxing act was repealed. If the Collector of Internal Revenue had obeyed the instructions of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury (*R. 48*), this collection would never have been made and this suit would not have been necessary. The authoritative ruling of the Commissioner was:

> "Where the decedent died prior to July 1, 1902, and the property was left in trust by the will, but had not been turned over to the trustee before July 1, 1902, legacy tax will not accrue." *Treasury Decision 552, R. 135.*

The foregoing was never revoked or modified (*R. 48*). It is submitted that the ruling thus formally announced is correct and ought to have been applied in the instant case.

All interests of legatees and distributees of testate or intestate decedents are "contingent," *within the meaning of the Act of July 27, 1902,* until the processes of administration have gone forward to the point at which ascertainment of the taxable values is practicable.

> *United States v. Jones, 236 U. S., 105;*
> *McCoach v. Pratt, 236 U. S. 562.*

There is a definite, direct and explicit finding of fact that the value of these residuary legacies could not be ascertained on July 1, 1902 (*Finding XII, R. 43*).

All the interests in the residuary estate in respect of which the portions of the sum sought to be recovered are

retained by defendants were interests in a trust fund provided for by the will. No part of this fund was set aside prior to July 1, 1902. These interests remained contingent on that date, not only because the fund remained unascertained (*R. 42-3*) but also because all such interests, in the practical sense in which the term was used (*McCoach v. Pratt, supra*), must be deemed contingent until there is an actual fund in the hands of the trustee to which they attach. This was the deliberate view of the Treasury Department (*supra, p.* 14).

Moreover, in the instant case, as to the smaller trust funds and the interests therein in respect of which taxes were computed, there were additional contingencies that were not satisfied before July 1, 1902. *The thirty-seventh paragraph of the will made all the interests in trust funds inalienable and prohibited anticipation. The twenty-sixth paragraph gave the executors discretionary power to diminish all pecuniary legacies* provided for by preceding paragraphs, thus assimilating these interests to those held to be contingent and the tax thereon refundable in *Uterhart v. United States* (*240 U. S., 598*), and to those as to which the United States confessed error on appeal to this Court in *Ryle v. United States* (*239 U. S., 658*). It was therefore, impossible to ascertain the value of these legacies until the value of the residuary estate could be ascertained (*see R. 43*) and this, as the finding states, could not be done prior to July 1, 1902.

The *interests defined by paragraphs six to twenty-two were contingent in still another sense.* All these paragraphs provide for trust funds of certain amounts (*subject to diminution in the discretion of the executors* under the twenty-sixth paragraph), and, also, for definite monthly payments until the establishment of the funds. And none of the funds was set up until after July 1, 1902.

The monthly payments were not proportioned to the trust funds—in other words, with trust funds of equal amounts one legatee would receive a larger monthly payment than another. For example, the trust funds for Flora Wolff and Celia Loeb were both $40,000 but the former received $120 per month (*R. 21, 40*) and the latter $125 per month (*R. 26, 40*). Trust funds of $60,000 were directed for Rosa Keiffer and Carrie Rauch, but the former was given, until the establishment of the fund, $180 per month (*R. 22, 40*) and the latter $160 per month (*R. 24, 40*). These rights to receive monthly payments were temporary and conditional rights, terminating within the discretion of the trustees and, therefore, subject to the rule of *Uterhart v. United States, 240 U. S. 598*. None of the legatees received, prior to July 1, 1902, as much as $10,000.00, the minimum taxable legacy, or any definite interest at all extending beyond that date in these monthly payments. As to the rights in the trust funds that were not set aside until after July 1, 1902, their interests were the same as those which were held not to be taxable (*Vanderbilt v. Eidman, 196 U. S. 480*). Yet *the Treasury Department wholly ignored these monthly payments in all its calculations*, and assumed to tax these interests as though these legatees took the income of the trust funds from the death of their testator. Letters testamentary were issued on November 1, 1900 (*R. 38*), but the processes of administration were delayed in spite of the diligence of the executors and even the amount of the New York transfer tax was not settled until late in 1903 (*R. 39*). Expenses of administration must necessarily have been incurred after July 1, 1902. On that date the value of the residuary estate could not be ascertained. The Court of Claims found this to be the fact (*R. 43*).

The judgment in *United States v. Jones, supra,* was placed not only upon the ground that—

> "debts and expenses had not been ascertained,"

but, also, upon the grounds that—

> "what, if anything, would remain after their payment was uncertain." *236 U. S. 105, 114.*

Extremely persuasive is the fact that the tax was a progressive tax, the rate increasing with the value of the distributive share or legacy. Resort to such a progressive tax plainly implies that *the tax is never to attach until the value becomes an ascertained value.* This consideration was found of importance in *United States v. Jones, supra,* the Court, with reference to legatees and distributees, saying:

> "The only right which can be said to vest in them at the time of the death is a right to demand and receive at some time in the future whatever may remain after paying the debts and expenses. But *that that right was not intended to be taxed before there was an ascertained surplus or residue* to which it could attach is inferable from the taxing act as a whole and especially from the provisions whereby the rate of the tax was made to depend upon the value of the legacy or distributive share." *236 U. S. 105, 112.*

Conclusion.

Claimants should have judgment for the amount claimed. All of which is respectfully submitted.

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